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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

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10 CHRISTINA RUSSELL, an individual,

11 Plaintiff,

12 v.

13 COMCAST CORP., a foreign corporation,  
14 Short Term Disability Plan and Long Term  
15 Disability Plan sponsor for the Comcast Short  
16 Term Disability Plan and Long Term  
17 Disability Plans; et al.,

18 Defendants.

No. C08-309Z

ORDER

19 This matter comes before the Court on Plaintiff's motion for summary judgment,  
20 docket no. 19, and Defendants' cross motion for summary judgment, docket no. 26. The  
21 Court has reviewed the briefs and records filed herein and, being fully advised, now enters  
22 the following Order GRANTING Defendants' cross-motion for summary judgment,  
23 DENYING Plaintiff's motion for summary judgment, and DENYING Plaintiff's request for  
24 attorney's fees and costs.  
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1 **FACTS**

2 Plaintiff Christina Russell (Russell) began work with Defendant Comcast Corporation  
3 (Comcast) as a Commercial Coordinator on January 19, 1999. CR 0017, 0144.<sup>1</sup> Included in  
4 Russell's benefits package with Comcast was Company-paid short-term disability (STD)  
5 coverage. CR 0239. The Summary Plan Description (SPD) explained that enrollment in  
6 STD coverage was automatic after 91 days of employment and became available to  
7 employees "who are actively at work and suffer a non-work related injury or illness for a  
8 period longer than seven calendar days." Id. For purposes of the STD plan, "disability is  
9 defined as being unable to perform your *own job*." Id.

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12 To support a finding of short-term disability, a claimant had to submit the following  
13 information: "**clinical** medical data from your physician's office . . . includ[ing] your  
14 objective medical findings, physician's physical exam findings, the results of diagnostic  
15 testing, confirmation of surgical procedures, etc. Subjective complaints, must be supported  
16 by the clinical findings." CR 0301 (emphasis in original). The maximum duration of STD  
17 benefits was "26 weeks per calendar year." CR 0239. Comcast funded the STD plan, id.,  
18 but delegated claims administration responsibilities to Defendant Broadspire Services Inc.  
19 (Broadspire). CR 0144, 0301.<sup>2</sup>

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22 <sup>1</sup> Citations to "CR" indicate documents contained in the Administrative Record. These documents  
23 were submitted along with the Declaration of Michael Jacobson, docket no. 21, which was filed with  
24 Plaintiff's Motion for Summary Judgment, docket no. 19.

25 <sup>2</sup> Plaintiff also elected Long-Term Disability (LTD) coverage. CR 0002, 0286. LTD coverage  
26 "protect[s] [participants] from loss of income during an illness or injury that extends beyond 26  
weeks." CR 0246. While Plaintiff asserts a cause of action for LTD benefits, Plaintiff never became  
eligible for such benefits because Broadspire denied her STD claim before she accrued the requisite  
26 weeks. See CR 0171 (stating that Russell's STD claim was denied on 1/14/05 and that her start  
date for LTD benefits was 2/7/05). Therefore, the Court will not address other specific requirements  
of the LTD Plan.

1 On August 2, 2004, Russell stopped working because of a “major depressive disorder  
2 with psychotic symptomatology [sic].” CR 0079. Russell began receiving STD benefits on  
3 August 9, 2004. CR 0137. Dr. Kim Emory examined Russell on August 17, 2004, and  
4 indicated that Russell was very depressed, was suffering from panic attacks once or twice per  
5 week, had suicidal ideation, and heard voices and saw shapes in her room at night. CR 0079,  
6 0153.

8 Dr. David Roys, a psychiatric specialist, examined Russell on September 21, 2004.  
9 CR 0079, 0156. Dr. Roys met with Russell fairly regularly over the next four months.<sup>3</sup> On  
10 Russell’s initial visit, Dr. Roys described her as listless, “mildly depressed,” and suffering  
11 from hallucinations and panic attacks that lasted “approximately 30 minutes” and occurred  
12 “10 times in the last two months.” CR 0156. On October 20, 2004, Dr. Roys noted that  
13 Russell was agitated, listless, and suffering from middle insomnia and paranoia; Dr. Roys did  
14 not, however, check off that Russell was suffering from panic attacks. CR 0157.

16 On October 25, 2004, Dr. Barry Glassman independently reviewed Dr. Roys’  
17 assessment of Russell. CR 0079. Dr. Glassman confirmed that Russell was suffering from  
18 “paranoia and lability that would preclude [her] from performing the core elements of her  
19 own occupation,” but that she would likely be ready to return to work at the next review. Id.

22 On December 8, 2004, Dr. Roys described Russell as pressured, loud, agitated, unable  
23 to spontaneously compose herself, and suffering from hallucinations. CR 0158. Dr. Roys  
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25 <sup>3</sup> See Dr. Roys’ Behavioral Health Clinician Statements dated September 21, 2004 (CR 0156),  
26 October 20, 2004 (CR 0157), December 8, 2004 (CR 0158), January 5, 2005 (CR 0161), January 12,  
2005 (CR 0170), January 21, 2005 (id.), and January 28, 2005 (id.).

1 once again noted that Russell was not suffering from panic attacks. Id. Dr. Glassman  
2 performed another peer review on December 13, 2004, and listed Russell as “agitated,”  
3 “irritable,” and suffering from “hallucinatory phenomena.” CR 0159. He recommended that  
4 Russell be precluded “from performing the core elements of her own occupation from  
5 12/13/04-1/13/05.” Id.

7 On January 18, 2005, Broadspire reviewed Russell’s records and denied the extension  
8 of her STD benefits. CR 0165-66.<sup>4</sup> Broadspire’s letter to Russell explained that, despite Dr.  
9 Roys’ authorization of benefits through January 13, 2005, the “data lacked examination  
10 findings to support disability.” CR 0165. Broadspire had not received information sufficient  
11 “to support a functional impairment.” Id. Thus, it “ha[d] no other recourse but to deny  
12 [Russell’s] request” for STD benefits. Id. Russell could appeal the determination to  
13 Broadspire within 180 days. Id.<sup>5</sup> If appealed, the letter detailed additional medical  
14 information that was necessary “to perfect [Russell’s] claim,” such as “information that  
15 documents . . . the frequency, duration, and intensity, of your symptoms observed” and other  
16 findings like “results of a formal mental status exam or performance based tests of  
17 psychological functioning with standardized scores.” Id.<sup>6</sup>

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21 <sup>4</sup> Russell alleges that a social worker, Jen, made the initial recommendation to Broadspire to deny  
22 Russell’s STD benefits. Pl.’s Reply & Response at 6 (docket no. 28). The Record demonstrates that  
23 a social worker by the name of Jen recommended that Russell’s STD benefits be denied. CR 0109-  
11. There is no evidence to suggest, however, that either the initial or the final denial was premised  
solely on this recommendation.

24 <sup>5</sup> The SPD provided further explanation of the appeals process and confirmed that the “review will  
25 be conducted by the Claims Administrator or appropriate named fiduciary.” CR 0281. Broadspire  
was the Claims Administrator. CR 0301; see also CR 0289 & 0293. The SPD also stated that “[a]ll  
decisions are final and binding unless determined to be arbitrary and capricious by a court of  
competent jurisdiction.” CR 0282.

26 <sup>6</sup> The letter further explained that “[t]o support your disability you must include sufficient clinical  
data that is applicable to your claim for disability, such as, but not limited to (a) Office notes,

1 On January 28, 2005, Russell appealed the denial of her STD benefits. CR 0168.  
2 Russell submitted additional documents from Dr. Roys, including a letter dated January 28,  
3 2005, and Progress notes dated January 12, January 21, and January 28, 2005. CR 0169-70.  
4 On January 12, 2005, Dr. Roys described Russell as “very irritable” and “moderately  
5 depressed.” CR 0170. On January 21, 2005, he explained that Russell “had an episode while  
6 she was cleaning her bathroom of shaking and feeling weak” that Dr. Roys concluded  
7 “sounds more like a panic attack than a seizure.” Id. On January 28, 2005, he described  
8 Russell as “very depressed” and suffering from “middle insomnia and severe fatigue.” Id.  
9 The letter from Dr. Roys likewise explained that Russell “remains quite depressed and  
10 irritable” and “appears rather hostile.” CR 0169. However, her “panic attacks have  
11 improved, and are happening rarely.” Id. Dr. Roys ultimately concluded that Russell “still  
12 has sufficient depression to be disabled.” CR 0170.

15 Broadspire referred Russell’s file to Jim Knisley, RN. CR 0126. Knisley affirmed  
16 Broadspire’s initial denial, concluding that the provider had failed to “substantiate any  
17 clinical examination findings in the areas of cognitive, emotional or behavioral spheres  
18 which would support that the [claimant] would be unable . . . to perform the core elements of  
19 her job.” Id. Russell’s file was then referred to a Physician Peer Reviewer, Dr. Elana  
20 Mendelssohn, PsyD, a specialist in clinical and neuropsychology. CR 0171-73. Dr.  
21 Mendelssohn’s Peer Review, dated March 23, 2005, summarized Dr. Roys’ reports, noting  
22 that “[i]t was [Dr. Roys’] opinion that the claimant was disabled due to depression.”  
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26 treatment notes (b) X-ray reports, diagnostic test results, lab work (c) Consultation reports, hospital notes.” CR 0165-66.

1 CR 0172. She indicated, however, that Dr. Roys' January 28 letter confirmed that Russell's  
2 "panic attacks have improved and rarely occur." Id.

3 Dr. Mendelssohn did not interview or speak with Russell directly; however, she did  
4 engage Dr. Roys in a conversation "to clarify the claimant's mental status." CR 0171-72.  
5 The two doctors discussed Dr. Roys' "opinion that claimant was unable to work due to  
6 negativity, irritability, and possible physical damage." CR 0172. Dr. Mendelssohn's Peer  
7 Review does not reflect any discussion between the doctors about Russell's panic attacks.  
8 See id.

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10 Dr. Mendelssohn concluded that "the information does not support a functional  
11 impairment from 1/14/05 to 2/06/05." Id. While earlier "documentation indicated inability  
12 to work primarily due to panic attacks and hallucinations . . . , more recent documentation  
13 does not indicate the presence of these symptoms." Id. Additionally, there were no "reports  
14 of acts of violence or aggressive behaviors." Id. In sum, "the examination findings and  
15 behavioral observations fail to describe a psychological condition impacting the claimant's  
16 functioning to a degree to preclude her from performing her own occupation." Id.

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18 On April 1, 2005, the Broadspire Appeal Committee (Appeal Committee) denied  
19 Russell's appeal. CR 0144-45. After reviewing the documents submitted, the Appeal  
20 Committee reasoned that "there is a lack of current medical evidence (i.e. continued presence  
21 of panic attacks and hallucinations; examination findings and/or behavioral observations etc.)  
22 to substantiate significant impairments in your current functioning that would have prevented  
23 you from performing your job as a Commercial Coordinator." CR 0144. The denial was  
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1 effective as of the date of the initial denial, January 14, 2005. Id. The letter explained that  
2 Russell had the right to bring a civil action under ERISA. Id. This action followed.

### 3 **DISCUSSION**

#### 4 **A. Standard of Review**

5 A court reviews benefit denial claims under an ERISA plan *de novo* “unless the  
6 benefit plan gives the administrator or fiduciary discretionary authority to determine  
7 eligibility for benefits.” Firestone Tire Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989).  
8 Where a plan grants discretionary authority, the court reviews the administrator’s decision  
9 for abuse of discretion. Saffon v. Wells Fargo & Co. Long Term Disability Plan, 522 F.3d  
10 863, 866 (9th Cir. 2008). Where a plan administrator has discretion, a motion for summary  
11 judgment merely provides the “conduit” for bringing the issue before the court, and the usual  
12 tests of summary judgment do not apply. Bendixen v. Standard Ins. Co., 185 F.3d 939, 942  
13 (9th Cir. 1999). It is the primary job of plan administrators—not the courts—to evaluate a  
14 claimant’s eligibility for benefits. Jordan v. Northrop Grumman Corp. Welfare Benefit Plan,  
15 370 F.3d 869, 875 (9th Cir. 2004) (explaining that courts “cannot substitute [their] judgment  
16 for the plan administrator’s”).

17 A court can “set aside the administrator’s discretionary determination only when it is  
18 arbitrary and capricious.” Id. A determination is arbitrary and capricious only where it is  
19 “clearly erroneous” and, thus, is not “grounded on *any* reasonable basis.” Id. More  
20 specifically, “[a]n ERISA administrator abuses its discretion only if it (1) renders a decision  
21 without explanation, (2) construes provisions of the plan in a way that conflicts with the plain  
22 language of the plan, or (3) relies on clearly erroneous findings of fact.” Boyd v. Bert

1 Bell/Pete Rozelle NFL Players Retirement Plan, 410 F.3d 1173, 1178 (9th Cir. 2005); see  
2 also Bendixen, 185 F.3d at 944 (holding that an administrator does not abuse his discretion if  
3 the decision was “based upon a reasonable interpretation of the plan’s terms and was made in  
4 good faith”) (citations omitted).

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6 Moreover, ERISA administrators need not accord special weight to the opinions of a  
7 claimant’s treating physician, nor may courts impose a “discrete burden of explanation [on  
8 plan administrators] when they credit reliable evidence that conflicts with a treating  
9 physician’s evaluation.” Black & Decker Disability Plan v. Nord, 538 U.S. 822, 834 (2003).  
10 In sum, where there is relevant evidence in the administrative record that reasonable minds  
11 might accept as adequate to support a conclusion, even if it is possible to draw two  
12 inconsistent conclusions from the evidence, the administrator’s decision must be allowed to  
13 control. LaPrease v. Unum Life Ins. Co. of Am., 347 F. Supp. 2d 944, 954 (W.D. Wash.  
14 2004) (Zilly, J.).

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16 *I. Factoring in a Conflict of Interest*

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18 Courts apply the abuse of discretion standard even if there are egregious conflicts of  
19 interest. Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 965 (9th Cir. 2006). Where a  
20 plan administrator has a conflict of interest, a court’s review of the plan administrator’s  
21 decision must be “informed by the nature, extent, and effect on the decision-making process  
22 of any conflict of interest.” Id. at 967. In short, where there is evidence of a conflict of  
23 interest, courts must apply an “abuse of discretion review, tempered by skepticism  
24 commensurate with the plan administrator’s conflict of interest.” Id. at 959. The level of  
25 skepticism with which a court views a conflicted administrator’s decision may be greater if a  
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1 structural conflict of interest is accompanied by evidence of malice, self-dealing, a  
2 parsimonious claims-granting history, a failure to adequately investigate or ask the plaintiff  
3 for necessary evidence, or a failure to credit a claimant's reliable evidence. Id. at 968-69; see  
4 also Beamish v. The Hartford/The Hartford Financial Servs. Group, Inc., 487 F. Supp. 2d  
5 1196, 1202 (W.D. Wash. 2007) (Zilly, J.); Metropolitan Life Insurance Co. v. Glenn, --- U.S.  
6 ---, 128 S. Ct. 2343, 2351 (2008) (explaining that a conflict "should prove less important  
7 (*perhaps to the vanishing point*) where the administrator has taken active steps to reduce  
8 potential bias and to promote accuracy") (emphasis added).<sup>7</sup>

10 An inherent conflict most commonly "exists when a plan administrator . . . is also the  
11 sole source of funding." Abatie, 458 F.3d at 965 n.5 (citing Bruch, 489 U.S. at 105). A  
12 similar conflict results when "an insurer that acts as both the plan administrator and the  
13 funding source for benefits operates under what may be termed a structural conflict of  
14 interest." Abatie, 458 F.3d at 965 (citing Tremain v. Bell Indus., Inc., 196 F.3d 970, 976 (9th  
15 Cir. 1999)).

17 The Court may consider extrinsic evidence outside the administrative record "to  
18 decide the nature, extent, and effect on the decision-making process of any conflict of  
19 interest." Abatie, 458 F.3d at 970. The "decision on the merits, though, must rest on the  
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22 <sup>7</sup> The Supreme Court's recent holding in Metropolitan Life is consistent with the Ninth Circuit's  
23 holding in Abatie. See Hoskins v. Bayer Corp. & Business Services Long Term Disability Plan, 564  
24 F. Supp. 2d 1097, 1103 (N.D. Cal. 2008) (concluding that there was "no inconsistency between the  
25 Ninth Circuit's holding in Abatie . . . and the Supreme Court's recent decision in Metropolitan  
26 Life"). In Metropolitan Life, the Court reiterated that "when judges review the lawfulness of benefit  
denials, they will often take account of several different considerations of which a conflict of interest  
is one." 128 S. Ct. at 2351. In addition to explaining when a conflict might reach the "vanishing  
point," the Court explained that a conflict "should prove more important (perhaps of great  
importance) where circumstances suggest a higher likelihood that it affected the benefits decision."  
Id.

1 administrative record once the conflict (if any) has been established.” Id. (citing Doe v.  
2 Travelers Ins. Co., 167 F.3d 53 (1st Cir. 1999)). This Court considered extrinsic evidence to  
3 determine the effect, if any, the conflict may have had on Defendants’ decision-making  
4 process.<sup>8</sup>

## 6 2. Factoring in Procedural Irregularities

7 Much like a conflict of interest, “[a] procedural irregularity . . . is a matter to be  
8 weighed in deciding whether an administrator’s decision was an abuse of discretion.”  
9 Abatie, 458 F.3d at 972. *De novo* review becomes appropriate only “[w]hen an administrator  
10 engages in *wholesale and flagrant* violations of the procedural requirements of ERISA.” Id.  
11 at 971 (emphasis added). A minor procedural irregularity, on the other hand, will not change  
12 the standard of review from abuse of discretion to *de novo*. Id. (citing Gatti v. Reliance  
13 Standard Life Ins. Co., 415 F.3d 978, 985 (9th Cir. 2005)). Where an administrator engaged  
14 in an “ongoing, good faith exchange of information” with the claimant, courts give the  
15 “administrator’s decision broad deference notwithstanding a minor irregularity.” Abatie, 458  
16 F.3d at 972 (citations omitted).

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19 The Court may “take additional evidence when [procedural] irregularities have  
20 prevented full development of the administrative record” to effectively recreate what the  
21 administrative record should have included. Id. at 973; see also Bartholomew v. Unum Life  
22 Ins. Co., 579 F. Supp. 2d 1339, 1341 (W.D. Wash. 2008) (Pechman, J.) (ruling that extrinsic  
23 evidence only included “information which the [parties] *already* had in their possession” and  
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25 <sup>8</sup> Specifically, the Court considered the evidence that Russell provided in declarations filed with her  
26 Motion (docket no. 19), Reply & Response (docket no. 28), and Memorandum of Supplemental  
Authorities (docket no. 37).

1 did not require additional discovery). If reviewing under an abuse of discretion standard, the  
2 Court need only consider evidence that could have been a part of the record that the  
3 administrator reviewed to make its decision. Jebian v. Hewlett-Packard Co. Employee  
4 Benefits Org. Income Prot. Plan, 349 F.3d 1098, 1110 (9th Cir. 2003).  
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6 In sum, the issues before the Court are: (1) whether the Plan gave both Comcast and  
7 Broadspire discretionary authority and thus requires the Court to review under an abuse of  
8 discretion standard; (2) the weight that the Court should give Broadspire's and/or Comcast's  
9 conflicts of interest in conducting its abuse of discretion analysis; (3) the weight that the  
10 Court should give, if any, to Broadspire's procedural errors in conducting its abuse of  
11 discretion analysis; and (4) whether Broadspire abused its discretion when it denied Russell's  
12 STD benefits.  
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#### 14 **B. Abuse of Discretion Standard**

15 The parties do not dispute that Comcast's Plan is an ERISA plan under 29 U.S.C.  
16 § 1002(1). The parties also agree that the plan granted discretionary authority to both Plan  
17 Administrator Comcast and Claims Administrator Broadspire. With respect to Comcast, the  
18 Plan also provided that Comcast reserved discretion over all eligibility decisions:  
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20 The Plan Administrator [Comcast] has the *exclusive* right, power and *authority*  
21 in its *sole and absolute discretion* to (1) Construe and interpret the provisions  
22 of the plans, (2) Make factual determinations, (3) *Take all actions and decide*  
23 *all questions of eligibility for benefits*, (4) Determine the amount of such  
benefits, (5) Resolve issues arising in the administration, interpretation, and/or  
application of the plans, and (6) Correct any defects.

24 CR 0295 (emphasis added). This provision unambiguously vests discretion in Comcast. See  
25 Abatie, 458 F.3d at 963 (holding that "plan wording [that] grant[s] the power to interpret plan  
26

1 terms and to make final benefits determinations . . . confers discretion on the plan  
2 administrator”).

3 As a “Claims Administrator” under the Plan, Broadspire was authorized to “determine  
4 eligibility for benefits in accordance with official plan documents.” CR 0295; see also  
5 CR 0301. This provision unambiguously vests discretion in Broadspire. See Abatie, 458  
6 F.3d at 963 (citing Bruch, 489 U.S. at 115) (holding that a plan that grants an administrator  
7 the right to determine eligibility for benefits gives the administrator discretionary authority).<sup>9</sup>  
8 Consequently, the Court will review the administrators’ decisions under an abuse of  
9 discretion standard.  
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### 14 **C. Evaluating the Conflicts of Interest**

#### 15 *1. Comcast’s Conflict of Interest*

16 The parties agree that Comcast funded the STD plan. The SPD confirms that STD  
17 benefits are “*Company-paid*.” CR 0239 (emphasis added). Both parties also agree that  
18 Comcast delegated to Broadspire authority to handle eligibility claims and appeals and that  
19 Broadspire made both the initial and final decisions with respect to Russell’s claim. Pl.’s  
20 Reply & Response at 9 (docket no. 28); Defs’ Mot. at 7 (docket no. 26); CR 0144-45,  
21 0165-66.  
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25 <sup>9</sup> The SPD further confirms that Broadspire is entitled to deferential review, stating that “[a]ll  
26 [appeal] decisions are final and binding unless determined to be arbitrary and capricious by a court  
of competent jurisdiction.” CR 0282.

1 Defendants argue that, as a result of this full delegation to Broadspire, Comcast cannot  
2 be considered “conflicted” because it did not make the STD eligibility decision. Yet, as the  
3 SPD makes clear, Comcast reserved “sole and *absolute discretion* to . . . take all actions and  
4 decide all questions of eligibility for benefits.” CR 0295 (emphasis added). Thus, even  
5 though Comcast did not make the decision in the instant case, Comcast had reserved  
6 discretion to ultimately do so; therefore, Comcast must be considered conflicted with respect  
7 to the STD Plan. See Abatie, 458 F.3d at 965 n.5 (explaining that a conflict exists simply  
8 “when a plan administrator . . . is also the sole source of funding”) (citing Bruch, 489 U.S. at  
9 105).

11 Even though Comcast is conflicted with respect to the STD Plan, the Court will not  
12 afford the conflict significant weight. A court may weigh a conflict more heavily where the  
13 conflict informs the eligibility decision. Abatie, 458 F.3d at 967-68. However, a conflict of  
14 interest reaches the “vanishing point” where an administrator “has taken active steps to  
15 reduce potential bias and to promote accuracy.” Metropolitan Life, 128 S. Ct. at 2351. In the  
16 instant case, Comcast played no role in the decision to deny Russell’s STD benefits. Instead,  
17 Comcast delegated such responsibilities to Broadspire and, thus, Comcast took active steps to  
18 reduce bias by walling itself off from eligibility decisions. As a result, Comcast’s conflict  
19 did not inform the decision-making process and the Court will view the claims decision with  
20 a low amount of skepticism.

## 23 2. *Broadspire’s Conflict of Interest*

24 Russell also asserts that Broadspire had a conflict of interest because it administered  
25 the STD Plan and insured the LTD Plan. Russell reasons that, because a claimant must  
26

1 accrue 26 weeks of STD benefits prior to becoming eligible for LTD benefits, Broadspire  
2 had a financial incentive to deny Russell's STD benefits just prior to 26 weeks so that  
3 Broadspire would not be obligated to pay her LTD benefits. Pl.'s Reply & Response at 9-10  
4 (docket no. 28). When an insurance company administers a plan and simultaneously profits  
5 by denial of coverage, there is an inherent conflict of interest. Lang v. Long-Term Disability  
6 Plan of Sponsor Applied Remote Tech., Inc., 125 F.3d 794, 797 (9th Cir. 1997). Thus,  
7 Russell argues that, even though Broadspire did not fund or insure the STD Plan, Broadspire  
8 was conflicted because it insured the LTD Plan and so was positioned to ultimately profit  
9 from denial of Russell's STD benefits. See id.

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12 The Court is not persuaded that Broadspire's role as the insurer of one plan informed  
13 its decision as the administrator of another plan. Russell cites no case law to support her  
14 position. Nor does Russell provide evidence that Broadspire acted with malice or self-  
15 dealing, or that Broadspire had a parsimonious claims-granting history. In fact, Russell  
16 admits numerous times that she is unsure whether to attribute Defendants' actions to  
17 "inattention or bad faith." See, e.g., Pl.'s Reply & Response at 18, 19, 23 (docket no. 28). A  
18 conflict is given a high level of skepticism only if Russell proves that the administrator acted  
19 with malice or self-dealing. Abatie, 458 F.3d at 968; Metropolitan Life, 128 S. Ct. at 2351.  
20 Such evidence is not established on the Record or on the extrinsic evidence. Consequently,  
21 even if the Court found that Broadspire was conflicted with respect to the STD Plan, the  
22 Court would nonetheless view Broadspire's decision with a low level of skepticism, which is  
23 the same amount of skepticism that the Court has found already applies to the instant claim  
24 decision as a result of Comcast's conflict.  
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1                   **D.     Evaluating Broadspire’s Procedural Irregularities**

2                   Russell contends that a number of procedural errors warrant admission of extrinsic  
3 evidence to effectively recreate what the Record should have been when Broadspire reviewed  
4 Russell’s claim. Yet, Russell fails to establish that the Record was incomplete as a result of  
5 purported procedural errors.  
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7                   First, Russell asserts that Defendants’ initial denial letter did not comply with  
8 ERISA’s procedural regulations, which require “[a] description of any additional material or  
9 information necessary for the claimant to perfect the claim.” 29 C.F.R. § 2560.503(g)(iii).  
10 Yet, unlike Booton v. Lockheed Medical Benefits Plan, in which the court held that the  
11 administrator violated the ERISA regulations by sending denial letters that merely told the  
12 claimant to submit her claim to another carrier, 110 F.3d 1461, 1462 n.5 (9th Cir. 1997),  
13 Broadspire’s initial denial letter included two paragraphs specifically drafted to provide  
14 Russell with the “medical information” necessary to “perfect” her claim. CR 0165-66. More  
15 specifically, the letter instructed Russell to submit the following: “behavioral observations  
16 which would include the frequency, duration, and intensity, of your symptoms observed  
17 [and] . . . the results of a formal mental status exam or performance based tests of  
18 psychological functioning with standardized scores.” CR 0165.<sup>10</sup>  
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21                   The instant case is also distinguishable from Saffon, 522 F.3d at 869-70. In Saffon,  
22 the court found an administrator’s denial letter insufficient which, similar to the denial letters  
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25 <sup>10</sup> The letter further explained: “To support your disability you must include sufficient clinical data  
26 that is applicable to your claim for disability, such as, but not limited to (a) Office notes, treatment  
notes (b) X-ray reports, diagnostic test results, lab work (c) Consultation reports, hospital notes.”  
CR 0165-66.

1 in the instant case, explained that denial was due to a lack of “objective medical information  
2 to support [plaintiff’s] inability to perform the duties of [plaintiff’s] occupation.” Id. at 870.  
3 However, in Saffon, the treating doctor had responded to the initial request for objective data  
4 by submitting Saffon’s MRI results. Id. at 869. The court deemed the letter insufficient  
5 because it failed to explain “why the [MRI] information Saffon has already provided is  
6 insufficient for that purpose.” Id. at 870. Here, although similar language was used in the  
7 letters in the instant case (see CR 0165, 0144), Russell did not previously submit objective  
8 evidence that Broadspire should have specifically addressed in its denial letters. Dr. Roys  
9 had not provided any objective observations since his December 8, 2004, Progress Report.  
10 CR 0158. The reports after December 8, 2004, contain only Russell’s self-reported  
11 symptoms. CR 0161, 0170. Thus, unlike the claimant in Saffon, Russell should have  
12 understood that the reason the information she provided was insufficient was because, quite  
13 simply, she had provided no recent objective findings.  
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15  
16 Additionally, the Saffon court notes that the administrator’s reference to a “Functional  
17 Capacity Evaluation” in the final denial letter was “useful,” but “came too late to do Saffon  
18 any good.” Saffon, 522 F.3d at 871. Broadspire included similar reference to “formal mental  
19 status exam[s] or performance based tests of psychological functioning with standardized  
20 scores.” CR 0165. Unlike the administrator in Saffon, however, Broadspire appropriately  
21 included this reference in its *initial* denial letter. Id. Thus, this information was not  
22 conveyed to Russell too late to be of any use; rather, it was provided with sufficient time for  
23 Russell to submit such objective findings on appeal. In sum, the Court does not find that  
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1 Defendants committed a procedural violation under 29 C.F.R. § 2560.503(g)(iii) that  
2 rendered the Record incomplete.

3         Second, Russell contends that Defendants violated 29 C.F.R. § 2560.503-1(g)(i) by  
4 failing to provide her with “the specific reason or reasons for the adverse benefits  
5 determination.” Russell asserts that the letter failed to explain why “Dr. Roys’ behavioral  
6 observations and exam findings did not constitute clinical medical evidence of a behavioral  
7 observation or exam finding.” Pl.’s Mot. at 15 (docket no. 19). Yet, the letter explained that  
8 the reason for denial of Russell’s claim was due to “a lack of current medical evidence . . . to  
9 substantiate significant impairments in your current functioning that would have prevented  
10 you from performing your job.” CR 0144. Thus, Broadspire’s specific reason for denying  
11 Russell’s claim was a lack of evidence. Such rationale is sufficiently specific and does not  
12 constitute a procedural violation of ERISA. See, e.g., LaPrease, 347 F. Supp. 2d at 948  
13 (upholding an administrator’s decision to deny benefits due to insufficient evidence to  
14 support that claimant was disabled).

15         Third, Russell asserts that the final denial letter contained rationale that was  
16 inconsistent with the initial denial letter. Pl.’s Mot. at 16-19 (docket no. 19). In Abatie, the  
17 Ninth Circuit reversed and remanded the district court’s ruling for “tack[ing] on a new reason  
18 for denying benefits in a final decision, thereby precluding the plan participant from  
19 responding to that rationale for denial at the administrative level.” 458 F.3d at 974. Yet,  
20 Abatie rests on a distinct set of facts and is distinguishable from the instant case. In Abatie,  
21 the defendant originally denied the plaintiff’s claim because there had been no waiver of  
22 premium application. Id. In its final denial letter, however, the defendant “continued to rely  
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1 on that reason, but also added a second reason—that Plaintiff had provided insufficient  
2 evidence to show” that the plaintiff was disabled. Id.

3         Broadspire’s final denial letter, on the other hand, did not add a wholly new reason for  
4 denying Russell’s claim. Broadspire initially denied Russell’s claim because the data  
5 “lacked examination findings to support disability.” CR 0165-66. In the final denial letter,  
6 Broadspire maintained that Russell lacked medical evidence, but also added examples of the  
7 type of evidence that Russell lacked. Specifically, Broadspire noted that there was “a lack of  
8 current medical evidence . . . i.e., continued presence of panic attacks and hallucinations.”  
9 CR 0144. Thus, in contrast to Abatie, the letters in the instant case merely give examples of  
10 the types of evidence that was lacking; the letters do not “tack on” entirely new reasons for  
11 the denial.  
12

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14         The Court finds that these purported procedural errors, if any, are minor. The  
15 irregularities did not prevent full development of the administrative record. Therefore, the  
16 Court need not consider extrinsic evidence to effectively recreate what the administrative  
17 record should have included at the time that Broadspire reviewed Russell’s claim. Abatie,  
18 458 F.3d at 973.<sup>11</sup> Likewise, because the procedural irregularities are minor, they do not  
19 change the standard of review from an abuse of discretion to *de novo*. Id. at 971. Like the  
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22 <sup>11</sup> Even if the Court did consider extrinsic evidence, the supplemental evidence provided at *Apdx*  
23 CR 0407-69, is cumulative and provides no additional information in support of either party. The  
24 documents containing evidence specific to Russell’s case include: (1) Progress Notes from Dr. Roys  
25 dating from 2/4/05 to 6/12/07 (*Apdx* CR 0407-14); (2) Russell’s earnings statement from 2/6/04  
26 (*Apdx* CR 0426); and (3) Russell’s Account Inquiry statements for her visits to Dr. Roys (*Apdx*  
CR 0412-30). Dr. Roys’ Progress Notes were cumulative of notes contained throughout the Record,  
describing Russell as mildly depressed, irritable, and hearing voices and seeing things. *Apdx*  
CR 0407. The financial documents merely show the cost of Russell’s doctor visits and benefits.  
*Apdx* CR 0426-30.

1 conflicts of interest, however, the Court will consider these minor procedural irregularities as  
2 factors when deciding whether Defendants abused their discretion. Id. at 974; see also  
3 Carder-Cowin v. Unum Life Ins. Co. of Am., 560 F. Supp. 2d 1006, 1016 (W.D. Wash.  
4 2008) (Lasnik, C.J.).

#### 6 **E. Defendants' Exercise of Discretion**

7 Even tempered by a low degree of skepticism, Broadspire did not abuse its discretion  
8 by denying Russell's STD claim. The Record contained medical records and assessments  
9 that both supported and refuted Russell's disability. Even though reasonable minds may  
10 have been able to draw two inconsistent conclusions from the evidence, as administrator,  
11 Broadspire's decision controls. LaPrease, 347 F. Supp. at 954.

13 First, Russell asserts that Broadspire abused its discretion by rendering its denial  
14 decision without explanation. Boyd, 410 F.3d at 1178. Yet, as the Court held in LaPrease,  
15 347 F. Supp. 2d at 954, a plan administrator who cites to a "lack of evidence" as justification  
16 for a benefit denial has not, *without more*, abused his discretion. The same is true here. It  
17 was not unreasonable for Broadspire to justify the denial due to "a lack of current medical  
18 evidence" of panic attacks and hallucinations when the Record, notably Dr. Roys' Progress  
19 Notes, supports that Russell's panic attacks were improving. CR 0169.

21 Second, Russell contends that Broadspire construed provisions of the plan in a way  
22 that conflicted with the plain language of the plan. Boyd, 410 F.3d at 1178. Yet, Russell  
23 fails to articulate how Broadspire did anything *but* adhere to the standards set forth in the  
24 plan. Broadspire's Process Overview Sheet states that it "must receive **clinical medical** data  
25 from your physician's office . . . [which] include[s] your objective medical findings,  
26

1 physician's physical exam findings, the results of diagnostic testing, confirmation of surgical  
2 procedures, etc." CR 0301 (emphasis in original). Most importantly, "[s]ubjective  
3 complaints, must be supported by the clinical findings." (Id.) (emphasis added). Broadspire  
4 was following this very standard when it denied Russell's claim for failing to "substantiate  
5 significant impairments" with "current medical evidence." Compare CR 0144 with CR 0301.  
6 Thus, Russell fails to demonstrate that Broadspire abused its discretion by construing plan  
7 provisions in a way that conflicted with the plan language.  
8

9 Third, Russell asserts that Broadspire abused its discretion because it relied solely on  
10 Dr. Mendelssohn and failed to give proper weight to Russell's treating physician, Dr. Roys.<sup>12</sup>  
11 Russell does not suggest that Dr. Mendelssohn was biased or unqualified. Therefore,  
12 Broadspire could reasonably rely on Dr. Mendelssohn's assessment to make its final  
13 eligibility determination. A plan administrator is not required to give special consideration to  
14 the opinions of a treating physician over those of a reviewing physician. Nord, 538 U.S. at  
15 834. And, while a decision to deny benefits cannot be arbitrary, the administrator need only  
16 provide "a reasonable basis for concluding that the medical condition was not disabling."  
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20 <sup>12</sup> In her Reply & Response (docket no. 28), Russell makes a new argument that Broadspire relied on  
21 the opinion of a social worker, Jen, in deciding to deny Russell's claim. Pl.'s Reply & Response at 6  
22 (docket no. 28); CR 0109-11. This argument misses the mark. The Record suggests that Jen's  
23 recommendation may have been used as a basis for the initial denial of Russell's STD benefits on  
24 January 18, 2005. CR 0109-11. Yet, the instant action is an appeal of the Appeal Committee's final  
25 denial of Russell's STD benefits on April 1, 2005. The very terms of the plan confirm that, "[w]hen  
26 reviewing an appealed claim, *no regard will be given to the initial denial.*" CR 0281 (emphasis  
added). Thus, Russell's allegation that Broadspire relied on Jen's recommendation for the initial  
denial is irrelevant to the instant appeal. Moreover, even if the Appeal Committee considered Jen's  
assessment in its final decision to deny benefits, the Record clearly reflects that the Appeal  
Committee also considered the evaluations of peer reviewers, treating physicians, and nurses, and  
that its decision was the result of weighing all such evaluations. In sum, Russell's contention that  
the Appeal Committee improperly relied solely on Jen's assessment is unsubstantiated by the  
Record.

1 Jordan, 370 F.3d at 880. A single medical opinion may constitute substantial evidence upon  
2 which a plan administrator may rely in adjudicating a claim. Boyd, 410 F.3d at 1179.

3       After reviewing Dr. Roys' assessments and notes and even speaking to Dr. Roys  
4 directly to clarify Russell's mental status, Dr. Mendelssohn had a reasonable basis for  
5 concluding that Russell was not disabled. CR 0172. Dr. Mendelssohn based her conclusion  
6 on two factors. First, although documentation indicated that Russell was unable to work  
7 because of panic attacks and hallucinations, such conditions were not indicated in recent  
8 documentation. CR 0172. This conclusion is reasonably based on Dr. Roys' January 28  
9 letter, which noted that Russell's "panic attacks have improved and rarely occur." CR 0169,  
10 0171-72. Second, Dr. Mendelssohn explained that, although Dr. Roys felt Russell was  
11 unable to work "due to irritability and possible harm to others," documentation did not  
12 indicate that Russell was homicidal or acted violently or aggressively toward others.  
13 CR 0172. Such a conclusion is also reasonably based on the Record, which contains no  
14 reference to homicidal, violent, or aggressive tendencies.

15       Finally, Russell cites Hackett v. Xerox Corp. Long-Term Disability Income Plan, 315  
16 F.3d 771 (7th Cir. 2003), to assert that Broadspire abused its discretion by failing to articulate  
17 in its final denial letter the reasons for relying on one doctor's assessment over another's.  
18 Yet, Hackett cannot be read so expansively. In Hackett, neither the administrator nor the  
19 reviewing doctor explained their conclusions for rejecting other treating doctors'  
20 assessments. 315 F.3d at 775. The court explained that, had the doctor "referenced the  
21 previous opinions and explained his deviation from them," it could have "assume[d] that any  
22 decision by the administrator took these factors into consideration" and was not arbitrary. Id.

1 Alternatively, had the administrator “provided a non-arbitrary explanation for their decision  
2 to credit [the doctor’s] opinion over those of the other doctors,” it could have also found that  
3 the administrator acted within its discretion. Id. at 775 n.3. Thus, Hackett requires that  
4 either the claims administrator or the doctor must explain why they have rejected other  
5 doctors’ assessments. Id. at 775. It does not, as Russell asserts, require that *both* parties  
6 must provide such explanations. As described previously, Dr. Mendelssohn explained why  
7 she rejected Dr. Roys’ conclusions. Dr. Mendelssohn’s reasoning “shows that [she] weighed  
8 the evidence for and against” Dr. Roys’ assessment and, although not explicitly cited in the  
9 final letter, the Court will “assume that any decision by the administrator took these factors  
10 into consideration.” Id.

13 Thus, although there is evidence in the Record before Broadspire that supports  
14 Russell’s claim of disability, there is also “relevant evidence in the administrative record that  
15 reasonable minds might accept as adequate to support” a finding of no disability. LaPrease,  
16 347 F. Supp. 2d at 954. Broadspire reasonably relied on the opinions of its reviewing  
17 physician, communicated fully with Russell as to how she must perfect her claim, and  
18 reasonably construed the terms of the Plan. Consequently, the Court holds that Broadspire  
19 did not abuse its discretion by denying Russell’s claim for STD benefits.

21 **F. Award of Attorney’s Fees and Costs**

22 Russell also requests a reasonable attorney’s fee and costs. Under 29 U.S.C.  
23 § 1132(g), “the court within its discretion may allow a reasonable attorney’s fee and costs of  
24 action to either party.” Courts construe this section as allowing for the recovery of attorney’s  
25 fees and costs incurred “regardless of the outcome.” Oster v. Barco of Cal. Employees’  
26

1 Retirement Plan, 869 F.2d 1215, 1221 (9th Cir. 1988). Thus, this Court must consider the  
2 issue of attorney's fees regardless of whether Russell's motion is granted or denied.

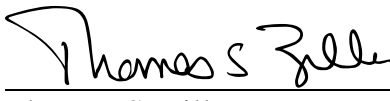
3 In exercising discretion, the Court considers the following criteria: (1) the degree of  
4 the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy  
5 an award of fees; (3) whether an award of fees against the opposing parties would deter  
6 others from acting under similar circumstances; (4) whether the parties requesting fees  
7 sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a  
8 significant legal question regarding ERISA; and (5) the relative legal merits of the parties'  
9 positions. Oster, 869 F.2d at 1222; Watkins v. Westinghouse Hanford Co., 12 F.3d 1517,  
10 1528-29 (9th Cir. 1993). The Court, having considered these factors, accordingly denies  
11 Plaintiff's request for attorney's fees and costs.

#### 14 **CONCLUSION**

15 Because Defendants did not arbitrarily and capriciously deny Russell's claim for STD  
16 benefits, the Court GRANTS Defendants' cross-motion for summary judgment, docket no.  
17 26, and DENIES Plaintiff's motion for summary judgment, docket no. 19. The Court also  
18 DENIES Plaintiff's request for attorney's fees and costs.

20 IT IS SO ORDERED.

21 DATED this 10<sup>th</sup> day of March, 2009.

22   
23 Thomas S. Zilly  
24 United States District Judge  
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